Supreme Court, U.S.
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No. 99-386

In The

Supreme Court of the United States

LUHR BROS., INC.,

Petitioner,

v.

ROBERT HANKS,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court For The Fifth District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Panama Railroad Co. v. Johnson* (1924), 264 U.S. 375, 68 L.Ed. 748, 44 S.Ct. 391, which held constitutional the Jones Act's grant to "injured seamen to elect between varying measures of redress and between different forms of action without according a corresponding right to their employers," should be revisited in the absence of Congressional amendment or a conflict in the lower courts?

2. Whether this Court should consider petitioner's statutory interpretation argument, which conflicts with this Court's decisions in *Cortes v. Baltimore Insular Line, Inc.* (1932), 287 U.S. 367 and *Cox v. Roth* (1955), 348 U.S. 207?

3. Whether this Court should consider an equal protection claim in the absence of state action under Amendment XIV when this Court has already held the Jones Act's election clause constitutional under Fifth Amendment Due Process in *Panama Railroad Co. v. Johnson*, 264 U.S. 375 (1924)?

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STATEMENT OF THE CASE

Although petitioner does not raise a sufficiency of the evidence argument, it misstates the facts and ignores the trial court's specific findings. Specifically, evidence supported the trial court's conclusion that the work-related "fall caused the herniated disc or damaged a pre-existing disc [rupture] which caused it to become symptomatic." Trial Court Order, A-5. The evidence also supported the trial court's finding that respondent "will endure a wage loss differential." Trial Court Order, A-5. The Illinois Appellate Court specifically reviewed those findings for evidentiary support and found "that the awards for pain and suffering and disability are adequately supported by the record. . . ." Appellate Court Opinion, A-15.

HOW THE FEDERAL QUESTION WAS PRESENTED

Although petitioner did raise an equal protection claim under Amendment XIV in the Illinois courts, it never claimed a Fifth Amendment Due Process violation. (C.287-310) This Court might not treat the invocation of the wrong amendment as a waiver of the constitutional claim, but this case presents an unusually conscious waiver. Petitioner expressly eschewed any Fifth Amendment claim at oral argument in the State court. Appellate Court Opinion, A-12. "At oral argument, [petitioner] insisted that its claim rests upon the equal protection clause of the fourteenth amendment and not the due process clause of the fifth amendment." Appellate Court Opinion, A-12. Thus, any Fifth Amendment claim has

been expressly and consciously waived in favor of a Fourteenth Amendment challenge.

This Fourteenth Amendment position poises Petitioner between the Scylla of adequate state grounds for the decision below and the Charybdis of lack of state action to trigger fourteenth amendment protection. Petitioner admits that the denial of its Illinois constitutional claim is not an independent state ground for the decision below. Petition for *Certiorari*, p. 4, fn 1. However, Petitioner has failed to identify any Illinois constitutional provision, statute or rule which deprives it of a federal right. Petitioner's only claim of state action was the state court's application of the federal statute as construed by this Court, three United States Courts of Appeals, and numerous state courts. (C.287-310) The Illinois court held that application of the federal statute by a state court was not state action within the meaning of the Fourteenth Amendment.

REASONS FOR DENYING THE PETITION

A. The Petition Should Be Denied Because It Fails to Present A Significant Question

The petition for writ of *certiorari* should be denied because this case meets none of the factors set forth in Rule 10, Supreme Court Rules. The petition inappropriately treats settled points of law as undecided issues and wrongly claims a conflict between the lower courts where none exists. This Court has already held that the "election" clause of the Jones Act is constitutional. *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 68

L.Ed. 748, 44 S.Ct. 391, 396 (1924). There is no conflict between the decision sought to be reviewed and a decision of this Court nor of a State court of last resort nor of any federal Court of Appeals. The petition for *certiorari* fails to cite a single case which holds that the Jones Act confers on the defendant the right to demand a jury trial or that the "election" clause of the statute is unconstitutional. In sum, the petition fails to establish a convincing reason to grant *certiorari*.

1. This Court's decision in *Panama Railroad Co. v. Johnson*, which held constitutional the Jones Act's grant to "injured seamen to elect between varying measures of redress and between different forms of action without according a corresponding right to their employers," should not be revisited in the absence of Congressional amendment or a conflict in the lower courts.

The Jones Act provides that a seaman "may, at his election, maintain an action for damages at law, with the right of trial by jury . . . ." 46 U.S.C. § 688(a). "The 'election' contemplated by the Jones Act is primarily a decision as to the form of trial – whether jury or non-jury." *McAfoos v. Canadian Pacific Steamships, Ltd.*, 243 F.2d 270, 273 (2d Cir. 1957). The federal courts have unanimously interpreted the "election" language as giving only the seaman-plaintiff the right to demand a jury. *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 392 (1924); *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 475-476 (9th Cir.), *cert. denied*, 513 U.S. 875 (1994); *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1489 (5th Cir.), *cert. denied*, 506 U.S. 975 (1992); *Rachal v. Ingram Corp.*, 795 F.2d

1210 (5th Cir. 1986); *McCarthy v. American Eastern Corp.*, 175 F.2d 724, 726 (3rd Cir. 1949).

In *Panama Railroad*, this Court rejected a due process challenge to the Jones Act's election language. In reaching the due process issue, the Court noted that the election clause of the Jones Act "permits injured seamen to elect between varying measures of redress and between different forms of action *without according a corresponding right to their employers. . . .* " *Panama Railroad*, **supra**, 264 U.S. 375, 392 (emphasis added). The Court concluded that "the right to choose cannot be accorded to both parties. . . . " 264 U.S. 375, 393.

The petition's initial premise – that "Congress did not intend to deny a Jones Act defendant the right to a jury trial or confer that right exclusively to the plaintiff seaman" (Petition for *Certiorari* at p.7) – is therefore simply wrong. Petitioner does not contend that an amendment to the statute requires this Court to revisit a previously settled area. Although Congress has now had seventy five years in which to repeal or amend the election language of the Jones Act, it has not done so. Congress did act in 1982, however, to limit the statute's application to alien and other foreign seamen. 46 U.S.C. § 688(b), Amendment of December 29, 1982, Pub.L. 97-389, Title V, § 503(a), 96 Stat. 1955. This is strong evidence of Congressional acquiescence in the *Panama Railroad* decision, rather "than mere congressional silence and passivity." *Flood v. Kuhn*, 407 U.S. 258, 283 (1972).

The state courts also agree that a Jones Act defendant has no right to demand a jury trial because the statute gives that "election" to the plaintiff-seaman. *Parker v.*

Rowan Cos., 599 So.2d 296, 298 (La.1992); *Heinhuis v. Venture Associates, Inc. of Louisiana*, 558 So.2d 1244 (La.App. 1990); *Allen v. Norman Brothers, Inc.*, 286 Ill.App.3d 1091, 1094, 678 N.E.2d 317, 318 (1997); *Gibbs v. Lewis & Clark Marine, Inc.*, 298 Ill.App.3d 743, 700 N.E.2d 227 (1998); *Peters v. City & County of San Francisco*, 1995 A.M.C. 788 (Cal.App. 1994) (unpublished decision). As the Louisiana Supreme Court noted, "respondents alone have control over whether the case is to be tried to a judge or jury." *Parker*, 599 So.2d at 298.

Although petitioner's citation of *Yates v. Dann*, 223 F.2d 64 (3rd Cir. 1955) creates an appearance of conflict, that case was decided under Rule 38 of the Federal Rules of Civil Procedure and not under the election clause of the Jones Act. "Any attempt to withdraw the [jury] demand without the respondents' consent could not succeed. [citation] *There is nothing in the Jones Act or in the peculiar procedural circumstances of this litigation which alters the application of this fundamental guarantee.*" *Yates v. Dann*, 223 F.2d 64, 66 (3rd Cir. 1955) (emphasis added). *Yates* has absolutely nothing to do with interpreting the Jones Act's "election" language. The failure of that decision even to mention *McCarthy v. American Eastern Corp.*, 175 F.2d 724, 726 (3d Cir. 1949), decided in that circuit only five years previously, strongly suggests that interpretation of the "election" clause was not before the court. *Yates*, therefore, is not in conflict with the decision below.

The petition should be denied because it has failed to articulate any basis to revisit an issue previously decided by this Court.

2. This Court should not consider petitioner's statutory interpretation argument, which ignores the plain language of the Jones Act and conflicts with this Court's decisions in *Panama Railroad Co. v. Johnson*, *Cortes v. Baltimore Insular Line, Inc.*, and *Cox v. Roth*

Petitioner's strained attempt to engraft a jury trial right onto the Jones Act by reference to the Federal Employers' Liability Act (45 U.S.C. §§ 51, *et seq.*) ignores the plain language of the Jones Act. "It is a well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language." *U.S. v. Apfelbaum*, 445 U.S. 115, 121 (1980). Courts may deviate from the plain language of a statute only in "rare and exceptional circumstances." *Ardestani v. INS*, 502 U.S. 129, 135 (1991).

The Jones Act's "election" clause specifically confers on the seaman-plaintiff the right to elect the form of trial. 46 U.S.C. § 688(a); *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 392 (1924). The Jones Act "permits injured seamen to elect between varying measures of redress and between different forms of action *without according a corresponding right to their employers. . . .* " *Panama Railroad*, **supra**, 264 U.S. 375, 392 (emphasis added).

The Courts of Appeals which have considered the issue have uniformly held that the Jones Act confers no right to jury trial on the defendant. *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 475-476 (9th Cir.), *cert. denied*, 513 U.S. 875 (1994); *Rachal v. Ingram Corp.*, 795 F.2d 1210, 1212-1213 (5th Cir. 1986); *Texas Menhaden Co. v. Palermo*,

329 F.2d 579, 580 (5th Cir. 1964); *McCarthy v. American Eastern Corp.*, 175 F.2d 724, 726 (3d Cir. 1949).

One state court has rejected the exact argument advocated by petitioner:

> Since the Jones Act contains its own limitations on jury trials and specifically states that only the plaintiff can demand a jury trial, and since the right to a jury trial under the FELA is only *implied*, the specific provisions of the Jones Act control in the case at bar. Such a construction is also *required* because obviously the Jones Act, by incorporating the FELA by reference, post-dates the FELA. While the general provisions of the Jones Act adopt the FELA, the specific provisions grant the plaintiff *at his election*, the sole right to seek a jury. It would be contrary to the express statutory language passed by Congress to hold that the jury provisions of section 53 of the FELA were adopted as part of the Jones Act. To the contrary, Congress adopted language absolutely inconsistent with the petitioner's position. *Gibbs v. Lewis & Clark Marine, Inc.*, 298 Ill.App.3d 743, 700 N.E.2d 227 (1998) (italics by the court).

There are no contrary cases anywhere, by any court.

Petitioner's argument hinges on the tacit assumption that these holdings and the plain language of the Jones Act do not exist. Because Petitioner has offered no basis to ignore the plain language of the "election" clause or *Panama Railroad*, its argument should be rejected.

Assuming, *ad arguendo*, that *Panama Railroad* is not dispositive of this issue, the petition's premise that rights implicit in the FELA (45 U.S.C. §§ 51, *et seq.*) control over

the explicit grant in the Jones Act is untenable. This Court's decisions in *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932) and *Cox v. Roth*, 348 U.S. 207 (1955) teach that, contrary to petitioner's position, language may not simply be cut from the FELA and pasted onto the Jones Act.

Although the FELA (45 U.S.C. §§ 51, *et seq.*) did not at the time[1] bar assumption of the risk as a complete defense, this Court in *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932), held that assumption of the risk was not a complete defense to Jones Act liability, but rather subject to the admiralty comparative fault doctrine.

In *Cox v. Roth*, 348 U.S. 207 (1955) this Court held that the failure of the FELA to provide specifically for an action against the defendant's estate did not preclude such an action under the Jones Act.

> The Jones Act, in providing that a seaman should have the same right of action as would a railroad employee, does not mean that the very words of the FELA must be lifted bodily from their context and applied mechanically to the specific facts of maritime events. Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met *in the admiralty setting*. *Cox v. Roth*, 348 U.S. 207, 209 (1955) (emphasis added).

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[1] The FELA was amended in 1939 to abolish the defense of assumption of the risk. 45 U.S.C. § 54 was amended by the act of August 11, 1939, c. 685, § 1, 53 Stat. 1404.

Thus, the underlying premise of petitioner's argument – that a jury trial right implicit in the FELA controls over the specific language of the Jones Act – is completely inconsistent with this Court's analysis of the relationship between the two statutes. Petitioner's statutory construction argument forms no basis to grant *certiorari*.

Schulz v. The Pennsylvania R.R. Co., 350 U.S. 523 (1956), relied on heavily by petitioner (Petition for *Certiorari* at 10-11), does not even address the "election" clause of the Jones Act. *Schulz* simply held that there was sufficient evidence to avoid a directed verdict on the issues of causation and negligence and is completely inapposite to the issues posed by the petition.

Respondent respectfully submits that the petition's statutory construction argument fails to provide a basis on which to grant *certiorari*.

3. This Court should not consider an equal protection claim when petitioner has failed to demonstrate state action under Amendment XIV and when this Court has already held the Jones Act's election clause constitutional under Fifth Amendment Due Process analysis

Petitioner's equal protection argument suffers from two fatal flaws which preclude reaching any of the equal protection analyses proffered by Petitioner. First, Petitioner expressly waived in the state court any Fifth Amendment claim it may have had. Appellate Court Opinion, A-12. Second, Petitioner's argument fails to establish "state action" sufficient to trigger application of the Fourteenth Amendment. Assuming that Petitioner's

claim may properly be re-cast as a Fifth Amendment rather than Fourteenth Amendment violation, the statute has already been held not tc violate Fifth Amendment due process on the very ground now asserted. *Panama Railroad Co. v. Johnson*, 264 U.S. 375 (1924). In the event that this Court does reach the equal protection challenge posed by Petitioner, there is a rational basis for the Congressional classification.

The petitioner's equal protection claim ironically has been that application of a federal statute constitutes state action. Appellate Court Opinion at A12-13. The Fourteenth Amendment was intended to regulate only conduct by the States or their instrumentalities. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); see *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979) (White, concurring); cf. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (no state action in absence of showing state regulation at least influenced decision). The respondent's claim – and petitioner's defenses – were founded on a federal statute, the Jones Act, 46 U.S.C. § 688(a). No claim or defense was based on any state law and petitioner does not claim the contrary. This failing precludes petitioner's Fourteenth Amendment challenge since the reason petitioner has no jury trial right in this matter is not state action, but a federal statute. See generally *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307 (5th Cir. 1978); *Simpson v. United States*, 42 F.2d 643 (7th Cir. 1965).

Petitioner expressly disclaimed that the "election" clause of the Jones Act should be measured against an equal protection guarantee incorporated into the due process clause of Amendment V. The state court noted that

"[a]t oral argument, [petitioner] insisted that its claim rests upon the equal protection clause of the fourteenth amendment and not the due process clause of the fifth amendment." Appellate Court Opinion, A-12. Given this express waiver, it would be inappropriate to extend judicial grace to consider a Fifth Amendment challenge now. See *Harris v. McRae*, 448 U.S. 297, 311 at fn. 17 (1980) (specifically raising Fifth Amendment equal protection claim); *compare San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 542, fn. 21 (1987) (re-formulating Fourteenth Amendment challenge as Fifth Amendment claim). This may have been simply a tactic to avoid the *Panama Railroad* holding; however, it should be treated as "an intentional relinquishment or abandonment of a known right or privilege" (*Brewer v. Williams*, 430 U.S. 387, 404 (1977) *quoting Johnson v. Zerbst*, 304 U.S. 458, at 464 (1938)), to preclude a Fifth Amendment challenge to the statute now.

Should this Court wish to consider the petition's claim as arising under the equal protection component of the due process clause of the Fifth Amendment, respondent respectfully submits that this Court's decision in *Panama Railroad Co. v. Johnson*, 264 U.S. 375 (1924) is dispositive of the issue. "But it never has been held, nor thought so far as we are advised, that to permit such a choice between alternatives otherwise admissible is a violation of due process of law." *Panama Railroad*, 264 U.S. 375, 392-393.

Assuming *ad arguendo* that this Court chooses to consider petitioner's equal protection claim as arising under the Fifth Amendment, *Panama Railroad* is still dispositive.

"Although 'the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process." ' *Schneider v. Rusk*, 377 U.S. 163, 168 (1964)." *Richardson v. Belcher*, 404 U.S. 78, 81 (1971).

But this Court has already determined in *Panama Railroad*, **supra**, that the "election" clause of the Jones Act does not violate the due process clause of the Fifth Amendment. Because the alleged discrimination in this case does not violate due process, the Fifth Amendment equal protection component cannot be violated.

Moreover, the Fifth Amendment equal protection component is not co-extensive with that of the Fourteenth Amendment when an important national interest is involved. "Although both Amendments require the same type of analysis, see *Buckley v. Valeo*, 424 U.S. 1, at 93 (1976, slip op., at 87), the Court of Appeals correctly stated that the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

In this case, the challenged provision of the Jones Act implicates an overriding national interest in maritime affairs. As the Petition notes, federal admiralty and maritime law has been "a special concern of this Court from the earliest days of the Republic." Petition for Writ of *Certiorari*, at p. 5. The Constitution established admiralty and maritime law as an overriding national interest by

extending federal judicial power to "all Cases of admiralty and maritime jurisdiction." U.S. Const. Art. III, § 2.

Assuming for the purposes of argument that traditional Fourteenth Amendment considerations apply to this case, petitioner has failed to identify a property interest (see *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 575 (1979)), a protected class, such as race (see *Brown v. Board of Education*, 347 U.S. 483 (1954)) or a fundamental right, such as marital status (see *Boddie v. Connecticut*, 401 U.S. 371 (1971)) which would trigger anything other than "rational basis" analysis. The right to trial by jury guaranteed by the Seventh Amendment is not so fundamental as to be required of state courts by the due process clause of the Fourteenth Amendment. *Hill v. McKeithen*, 409 U.S. 943 (1972). The Fourth Circuit has held similarly with regard to the equal protection clause of the amendment. *Letendre v. Fugate*, 701 F.2d 1093 (4th Cir. 1983). Because no property interest, suspect class nor fundamental right is involved, the rational basis standard of review is required. *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955).

"If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

This Court need not search far to find a rational basis for the Congressional classification at issue. Defendant's argument boils down to a claim that, because the statute precludes defendant from a jury trial in a Jones Act case

when railroads may obtain a jury trial in an FELA case, the statute is unconstitutional. Yet the Constitution itself distinguishes between maritime relations and all others. U.S. Const., Art. III, sec. 2, cl. 1. This Constitutional provision empowers Congress to give either party the right to trial by jury in a maritime case. *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 12 How. 443 (1851).

Aside from this Constitutional distinction, federal statutes frequently classify occupations and remedies without constitutional infirmity. Longshoremen and stevedores are treated differently from seamen, receiving not a jury trial with damages unlimited by statute, but what is essentially a workers' compensation remedy with trial to a longshore commissioner. See generally 33 U.S.C. §§ 901, *et seq.* This is a constitutional exercise of Congressional authority. *L'Hote v. Crowell*, 286 U.S. 528 (1932). Longshoremen are deprived by 33 U.S.C. § 905(b) of their common law right to recover for the unseaworthiness of the vessel. This, too, is constitutional. *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3d Cir. 1977), *cert. denied*, 434 U.S. 861. Railroad employees are treated differently than the vast majority of American workers who are covered by state workers compensation laws. See Federal Employers Liability Act, 45 U.S.C. §§ 51, *et seq.* The FELA's imposition of liability only on railroads, and not other interstate carriers is constitutional. *Second Employers' Liability Cases*, 223 U.S. 1, 52-53, 56 L.Ed. 327, 32 S.Ct. 169 (1912).

Tested in light of this substantial precedent, defendant's equal protection claim is completely meritless.

Historic admiralty principles, considerations of maritime uniformity, and the seaman's historical vulnerability to his employer's will also provide rational bases for the seaman's election of the form of trial.

Historically there was no provision "from which it can be inferred that civil causes in admiralty were to be tried by a jury, contrary to what the framers of the constitution knew was the mode of trial of issues of fact in the admiralty." (*Waring v. Clark*, 46 U.S. 441, 460 (1847); see also *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 475 (9th Cir. 1994), **citing** *Waring*.) This historical procedure provides a rational basis for treating shipping companies and railroads differently and, therefore, there is no equal protection violation. See *Williamson v. Lee Optical*, **supra**, 348 U.S. 483, 489.

The seaman's well-known vulnerability also provides a rational basis for the Congressionally mandated election. This Court has treated the injured seaman as a "ward of admiralty." *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); see also *The David Pratt*, F.Cas. No. 3597 (D.C. Me. 1839), *quoted in* Norris, *The Law of Seamen*, 4th Ed. 1985, section 24:2, p. 663. The peculiar vulnerability of the seaman provides a rational basis for the Congress to give seamen exclusively the option of a jury or non-jury trial, thus allowing the injured seaman to weigh the benefits and risks of each mode of trial, including the relative speed to hearing afforded by each method. See, **e.g.**, *Hernandez v. Power Construction Co.*, 73 Ill.2d 90, 382 N.E.2d 1201 (1978) (taking judicial notice of two year's greater delay in getting case to jury trial than bench trial). This is an entirely proper Congressional concern and the

"election" clause of the Jones Act reasonably effects that purpose.

In sum, petitioner has offered no basis to grant *certiorari* in this case.

CONCLUSION

For all of the foregoing reasons, the Petition for *certiorari* should be denied.

Respectfully submitted,

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